

SERVED: October 19, 2007

NTSB Order No. EA-5328

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of October, 2007

<hr/>)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	
	v.)	Docket SE-17479
)	
RYAN J. MOSHEA,)	
)	
	Respondent.)	
)	
<hr/>)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on November 7, 2006.¹ The law judge affirmed the suspension of respondent's airline transport pilot (ATP) certificate, but reduced the sanction from 60 to 50 days. The Administrator does not appeal the law judge's reduction in sanction. We deny respondent's appeal.

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

The Administrator's June 28, 2005 suspension order alleges violations of the Federal Aviation Regulations (FARs), 14 C.F.R. §§ 91.7(a), 135.65(b), and 91.13(a).² Respondent appealed the suspension order, and the Administrator subsequently filed the order as his complaint. Respondent asserted as an affirmative defense immunity from enforcement action based on his employer's (Key Lime) voluntary self-disclosure of violations under FAA Advisory Circular (AC) 00-58, *Voluntary Disclosure Reporting Program*.³ The law judge held that the Board lacks jurisdiction to review the discretion as to how the Administrator implements AC 00-58.

Facts

On October 22, 2004, on his approach to Cheyenne, Wyoming, respondent attempted to extend the landing gear on the aircraft he was flying. He got a green indicator light for the nose and right main gear, but a red indicator for the left main gear, even after "cycling" the gear a few times. Exh. CE-1. At one point, he reached down to pull the emergency extension, but the gear deployed before he had to take that step. Id. He flew the same

² Section 91.7(a) prohibits operation of a civil aircraft in an unairworthy condition. Section 135.65(b) requires the pilot-in-command to enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight. Section 91.13(a) prohibits careless or reckless operation of an aircraft so as to endanger the life or property of another.

³ AC 00-58 was reissued on September 8, 2006. The May 4, 1998 version was in effect at all times pertinent to this case. Nothing in the revised AC affects our decision here. All references are to the 1998 version.

aircraft from Cheyenne to Denver later that day, but did not experience a repeat of the problem. Id. Although he told Key Lime mechanic Marty Golden about it, respondent did not enter a description of the problem he had with the landing gear, or cause it to be entered, as a discrepancy in the aircraft maintenance log. Id.; Tr. at 221. The next day he flew the same aircraft to Cheyenne and then to Gillette, Wyoming, but did not experience any problems. Tr. at 221.

On October 25, 2004, respondent flew the aircraft again, and experienced the gear problem on approach to Denver, but, again, the gear eventually came down. Id.; Exh. CE-1. When he landed, he told Key Lime mechanic Mike Liotta that the gear was slow to extend, but respondent still did not make, or have made, an entry in the maintenance log. Id.; Tr. at 225.

On October 26, 2004, another pilot flying the same aircraft had the same left gear problem, and ran the emergency checklist, but was not able to extend the gear. The pilot diverted to an airport with emergency equipment standing by, at Centennial, Colorado. Tr. at 125-28. Before landing, the pilot eventually managed to lower the gear and landed safely. Tr. at 128.

While the aircraft was still in the air, however, Key Lime had notified the FAA, and an inspector traveled to Centennial, where a Key Lime employee indicated that, "he wanted to disclose the violation to" the inspector. Tr. at 89-90. Key Lime followed up with a letter on November 4, 2004, stating that the cause of the incident was a "lack of communication between the

pilot and maintenance." Exh. R-1. Key Lime submitted the letter as a "self-disclosure" in accordance with AC 00-58.⁴ Id. The FAA did not pursue action against Key Lime, but did pursue this enforcement action against respondent.

The law judge found that respondent experienced a mechanical irregularity that required reporting under § 135.65(b). Initial Decision at 309. The law judge also found that respondent failed to make, or have made, an entry regarding the irregularity in the aircraft maintenance log and, therefore, found a violation of § 135.65(b). Id. The law judge also found that this deficiency caused the aircraft to be unairworthy, such that respondent violated § 91.7(a). Id. at 310. Finally, the law judge found that respondent, because of the above breaches, also committed the residual offense of careless or reckless operation in violation of § 91.13(a). Id. The law judge modified the sanction from 60 to 50 days, "t[aking] ... into account" that respondent "consult[ed] with two [mechanics]." Id. at 311.

⁴ AC 00-58 provides information and guidance for certificate holders operating under Title 14 CFR when voluntarily disclosing to the FAA apparent violations of certain FAA regulations. "The FAA's policy of forgoing civil penalty actions when [a covered entity] detects violations, promptly discloses the violations to the FAA, and takes prompt corrective action to ensure that the same or similar violations do not recur is designed to encourage compliance with the FAA's regulations, foster safe operating practices, and promote the development of internal evaluation programs." AC 00-58, ¶ 4. "Certificate holders ... will receive a letter of correction in lieu of civil penalty action for covered instances of noncompliance that are voluntarily disclosed to the FAA...." Id. at ¶ 6.

Discussion

Respondent argues that the law judge erred in ruling that the Board has no jurisdiction to review the Administrator's decision to pursue enforcement action, citing Administrator v. Montgomery, 3 NTSB 2150 (1980). Respondent's Br. at 5. Also, respondent argues that the Administrator violated his policy in pursuing action, thereby violating respondent's "fundamental due process rights," citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Id. He also challenges the law judge's factual findings regarding the FAR violations. Id. at 29. The Administrator urges the Board to affirm the law judge's decision, arguing that the Board does not have jurisdiction to review respondent's affirmative defense under AC 00-58⁵ and, further, that the law judge did not err in finding that respondent violated §§ 91.7(a), 135.65(b), and 91.13(a). Administrator's Reply at 12-26.

The Board has previously held that it does not have the authority to review the Administrator's determination to pursue a matter through legal enforcement action.⁶ The Board is precluded

⁵ Citing Administrator v. Nixon, NTSB Order No. EA-4249 at 3 (1994); Administrator v. Doll, 7 NTSB 1294, 1296-97 (1991); Administrator v. Cardozo, 7 NTSB 1186 (1991); Administrator v. Hunt, 5 NTSB 2314, 2316 (1987); Administrator v. Heidenberger, NTSB Order No. EA-3759 at 3 (1992).

⁶ See Administrator v. Liotta, NTSB Order No. EA-5297 (2007) (Mr. Liotta, another Key Lime employee, is a witness in this case; although Mr. Liotta attempted to use the same affirmative defense in his own case, it is unrelated to the instant case); see also Nixon, supra; Heidenberger, supra; Doll, supra; Cardozo, supra; and Hunt, supra.

from deciding a case based on the Administrator's choice of pursuing an action against an individual. Such an action would intrude upon the Administrator's prosecutorial discretion. The Board's "jurisdiction concerning enforcement proceedings extends only to the question of whether safety and the public interest require affirmation of the Administrator's order."⁷

We have held that this jurisdiction "commences with the filing of a petition for review of an order of the Administrator and does not extend to an evaluation of the procedural steps leading to the issuance of that order."⁸ Respondent's claim that the Board should review the Administrator's decision to pursue an action against him is, therefore, unavailing. Board precedent is clear. We consider this issue by looking at where on the Administrator's decision timeline respondent asks the Board to assert jurisdiction. We may not insert ourselves at the point where the Administrator has sole discretion to make decisions; the Board's statutory charter prevents us from doing so.⁹ The discretion to pursue one remedy over another or to pursue enforcement action at all is within the Administrator's purview.¹⁰

⁷ Administrator v. Greiner, 1 NTSB 874, 877 (1970).

⁸ Hunt, supra at 2316.

⁹ See 49 U.S.C. § 44709.

¹⁰ See Liotta, supra; Nixon, supra; Heidenberger, supra; Doll, supra; Cardozo, supra; and Hunt, supra.

As the Administrator points out, in Montgomery, supra, the Board asserted its jurisdiction to review the Administrator's decision to impose a sanction when the respondents had filed reports under AC 00-46D, *Aviation Safety Reporting Program* (ASRP). The Administrator states that, in Montgomery, the Board found that the ASRP "was within the scope of its review authority." Administrator's Reply at 13. Montgomery, and its progeny,¹¹ clarify the parameters of the Board's jurisdiction. The Board has jurisdiction to review imposition of sanctions under the ASRP because it "relates to the sanctions to be imposed."¹²

But the Board does not have jurisdiction to review the Administrator's decision to bring enforcement action; the decision to pursue an enforcement action does not "relate to the sanctions imposed," as envisioned by the Board's statutory charter. One of the first cases to explore this issue after Montgomery illustrates this distinction by comparing the suspension occasioned by an enforcement action and the "actual impos[ition]" of the suspension.¹³

¹¹ Id.

¹² 49 U.S.C. § 44709(d)(3).

¹³ See Administrator v. Franks, 3 NTSB 3463, 3464 (1981) (order "suspend[ed]" respondent's certificate, "even though the suspension [was] not actually imposed by requiring respondent to surrender his certificate." The Administrator immediately waived the actual surrender of the certificate for the period of suspension, "to effectuate the terms of the ASRP....").

Further, even if we found that we had jurisdiction to review the Administrator's election (which, again, we do not), Accardi, supra, also is inapposite. Respondent has not established, and cannot establish, that the Administrator did not follow the policy set out in AC 00-58.

For clarification only, because we do not have jurisdiction to review the Administrator's discretion to pursue enforcement action, AC 00-58 does not even apply to violations of 14 C.F.R. Part 91,¹⁴ and two of the three allegations here are Part 91 violations. Further, as we pointed out in Liotta, AC 00-58 pertains to entities, companies, or carriers, not to individuals. While AC 00-58 outlines forgoing enforcement actions for "instances of noncompliance that are voluntarily disclosed to the FAA,"¹⁵ it extends these "immunity" provisions to individuals only in limited circumstances. As in Liotta, even if we had the authority to review the decision to "prosecute," respondent would not appear to meet the conditions for extension of immunity to him.

If the Administrator were to consider extending immunity to respondent, the Administrator would look to whether the violation involved a defect in Key Lime's practices or procedures, and whether that deficiency caused Key Lime to be in violation of the FARs.¹⁶ The Administrator would look to whether the airman

¹⁴ See AC 00-58, ¶ 3.

¹⁵ Id., ¶ 6.

¹⁶ Id., ¶ 13.a.(1).

inadvertently violated the FARs.¹⁷ The Administrator would also look to whether the airman immediately reported his violation to Key Lime.¹⁸ Finally, the Administrator would look to whether Key Lime immediately notified the FAA of the violation and its own deficiency.¹⁹

Respondent's violations did not involve a deficiency of Key Lime's practices or procedures. As Key Lime's disclosure letter stated, the cause was "lack of communication between the pilot and maintenance."²⁰ Exh. R-1. The violation was not inadvertent nor was it a result, directly or indirectly, of a deficiency in Key Lime's procedures. The duty to enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight is the responsibility of the pilot-in-command. As to the requirement for the airman to report the *violation*²¹ to the employer, respondent denies any

¹⁷ Id., ¶ 13.a.(2). A parenthetical indicates that the voluntary disclosure policy does not apply to the airman when his violation is the result of actions unrelated to the employer's deficiency.

¹⁸ Id., ¶ 13.a.(3).

¹⁹ Id., ¶ 13.a.(4).

²⁰ There is nothing in the record to indicate there was any change in Key Lime's practices and procedures as a result of this incident. While Key Lime personnel were "advised and instructed" regarding this incident, that advice and instruction was simply on how to comply with "Company and FAR rules." Exh. R-1. A simple re-emphasis of the rules does not equate to change in practice and procedure. We thus distinguish this case from that presented in Administrator v. Willette, NTSB Order No. EA-4468 (1996), where the certificate holder made significant changes to practices and procedures.

²¹ See AC 00-58, ¶ 13.a(1) ("...*violation* involves a deficiency of the employing entity's practices...."); ¶ 13.a(2) ("The airman

violation. He said that the allegation that he operated the aircraft "with a known discrepancy, is entirely false and unjustified," that there was "no open discrepancy on the aircraft of any sort," and that this was not anything "irregular." Exh. CE-9. He cannot have it both ways. He cannot assert both that he reported the violation and that there was none. Even now, he challenges the factual findings that he violated the FARs. Respondent's Br. at 29. And, while Key Lime reported the incident to the FAA, it was not because respondent reported it as a violation. While he told two mechanics about the incident, respondent neither recognized it, nor reported it, as a violation. Key Lime recognized the breach; respondent did not or would not.

As in Liotta, supra, respondent also could have reported his violation under the ASRP. The ASRP also has conditions, two of which it would appear respondent fails to satisfy. But, to maximize his opportunity for immunity from sanction, he should have reported his violation under the ASRP.

Conclusion

In sum, the invocation of the protections of AC 00-58 is misplaced. Key Lime determined that the cause of the incident was a lack of communication, not a deficiency in procedures.

(..continued)

... inadvertently violates the FAA's regulations...."); ¶ 13.a(3) ("The airman ... immediately makes the report of his/her apparent violation...."); and ¶ 13.a(4) ("The employing certificate holder ... immediately notifies the FAA of ... the airman['s] ... apparent violation....") (emphasis added).

The complaint alleged that respondent violated § 135.65(b), which requires the pilot-in-command to enter in the maintenance log each mechanical irregularity that comes to the pilot's attention. Respondent operated the aircraft when he knew about the condition that made it unairworthy, so he also violated § 91.7(a). These violations could not have been a result of a deficiency in Key Lime's procedures, even if a deficiency had existed. A preponderance of reliable, probative, and substantial evidence supports the law judge's findings as to the violations, and the law judge's conclusions are in accordance with law, precedent, and policy.

Respondent was also charged with a violation of § 91.13(a). The Administrator routinely includes a careless or reckless allegation in orders alleging violation of operational regulations. A charge under § 91.13(a) is proved when an operational violation has been charged and proven.²²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the reduction in sanction from 60 to 50 days, is affirmed; and

²² See Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002); Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002).

3. The 50-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.²³

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

²³ For purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).